Supreme Court, U.S.
FILED
FEB 14 1994
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(2)

NO. 93-1161

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

KATHERINE G. IVIMEY, and
JOHN R. IVIMEY, SR.,

Petitioners,

v.

AMERICAN BANK OF CONNECTICUT,

Respondent

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED

1. Is the entry of a directed verdict in a civil state jury trial because the Petitioners failed to meet their burden of proof after presenting four days of evidence a violation of the Seventh Amendment to the Constitution guaranting a trial by jury in suits at common law?

2. Was it a violation of the Petitioners' Seventh Amendment rights for the trial judge to exclude Petioners' offer of expert opinion testimony on the ground that such was irrelevant to the issues in this case or because the witness had not been properly qualified?

3. Was it a violation of Petitioners' Seventh Amendment rights for the trial judge to exclude from evidence testimony on the meaning of a mortgage note which the petitioners themselves admit was unambigious?

4. Is there a sufficient federal question for review to give the Court jurisdiction when the Petitioners failed to present their Seventh Amendment claim, or state constitutional claim of a right to a trial by jury to the Trial Court, or in their brief on appeal.

LIST OF PARTIES AND RULE 29.1 STATEMENT

The petitioners, John and Katherine Ivimey ("Ivimeys") are residential mortgagors of the Respondent, American Bank of Connecticut ("American Bank").

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Katherine G. Ivimey, and John R. Ivimey, Sr.
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v.

American Bank of Connecticut,
Respodent.

On Petition for Writ of Certiorari
To the Supreme Court of the State
of Connecticut

BRIEF OF RESPONDENT

AMERICAN BANK OF CONNECTICUT IN OPPOSITION

Respondent American Bank of Connecticut respectfully opposes the petition for a writ of certiorari to the Supreme Court for the State of Connecticut because this is a case affecting only private litigants and does not present any federal question in a way that conflicts with another state court of last resort or a United States Court of Appeals, and it has not decided any important federal question in a way that conflicts with the applicable decisions of the Supreme Court of the United States.

STATEMENT OF THE CASE

This is a state civil jury case brought by the pro se Petitioners-plaintiffs against American Bank of Connecticut, Respondent-Defendant, in response to a foreclosure action by the Respondent bank against the Ivimeys for being delinquent on their home mortgage (n1).

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n1. This foreclosure action was tried to a court in December, 1993, and a judgment in favor of the Bank for a foreclosure by sale was entered January 10, 1994. At present, there is a pending Motion to Reopen and Set Aside this judgment filed by the Petitioners.

The Ivimeys' suit claims nine separate counts against the Bank for various wide-ranging theories; from the claim that "each and every representation" by the bank regarding the plaintiffs mortgage, as well as "each and every account entry, statement and record made by the Bank " regarding their mortgage between November 1972 and November, 1985 " was knowingly inaccurate and deceitful", to claims of libel and slander, mental, emotional, and physical distress, that the Bank miscalculated the monthly payment of the mortgage by $1.94, and altered a check, and failed to properly credit payments or make tax escrow payments.

The mortgage note in question provides that the Petitioners promise to pay the Respondent " the sum of $40,900 with

interest from date at the rate of 7 1/4% interest payable monthly, in advance upon the unpaid balance of the note". Despite the Petitioners' suggestion at page 6 of their petition, the trial court did not affirm or find that payment of principle and interest were to be applied in advance.

After over five years of discovery requests and six unsuccessul motions for summary judgement filed by these pro se Petitioners, several weeks were spent in selecting a jury before the Petitioners retained counsel to try this case.

The day finally came when they were required to present their proof. The Petitioners subpoenaed several top corporate officers of the Respondent bank and were allowed to examine them fully. The Petitioners presented two purported expert witnesses to

testify regarding various tables and methods of amortizing mortgages and calculating monthly mortgage payments, but the trial court ruled such testimony inadmissible because it was either irrelevant to the issues in this case regarding the mortgage note in question, or because that the witness was not properly qualified. The petitioner John Ivimey, Sr. testified that he found no ambiquity in the mortgage note, and the court refused to allow any testimony as to the interpretation of the wording of the note.

After presenting four days of evidence, the Petitioners rested their case without requesting a continuance to present further evidence.

The defendant Bank moved for a directed verdict, which was granted after oral argument as to all nine counts of the plaintiff's complaint.

The trial court concluded that the nine count complaint of the plaintiffs did not contain proper allegations of liability or damages (T. Jan. 15, pp. 112) and that the evidence presented and the issues argued by the plaintiff would have led the jury to pure speculation, conjecture and surmise as far as any recovery to the plaintiff based upon the complaint as drawn. (T. Jan. 15, pp. 113). In reviewing all the evidence the trial court was at a total loss as to what monetary damages based upon the evidence the jury could even address that the plaintiff would be entitled to. (T. Jan. 15, pp. 113).

The Trial Court further found that "there are a lot of arguments made throughout the complaint where (the plaintiff) feels certain injustices were performed on the part of the bank. But, on the other hand there has been no sufficient evidence to establish a reasonable, probable basis on which the jury could determine any monetary damages (the plaintiff would) be entitled to." (T. Jan. 15, pp. 113).

The trial court also determined that the requested relief for an accounting and revision of the mortgage note were equitable remedies addressed to the court to be acted upon if the jury were to conclude there was merit to the plaintiff's case (T. Jan. 15, pp. 113-114). The trial court further concluded that there was no basis to recover

compensatory damages increased by interest at the highest rate allowed by law, or the defendant be denied additional interest on mortgage payments. (T. Jan. 15, pp. 114). The Trial Court then ruled that the plaintiffs had not met the burden of proof on the claim of punitive, exemplary or statutory damages (T. Jan. 15, pp. 115). Finally, on the claim for recision of the mortgage and note, the court concluded that this was addressed to the court and that based on the evidence the court did not know how it could conclude that the plaintiff was entitled to get back all the money he had paid the bank. (T. Jan 15, pp. 116). The trial court then directed a verdict for the defendant on each count. (T. Jan. 15, pp. 116).

There was absolutely no evidence presented that the defendant, American Bank of Connecticut, ever altered the date on a check presented by the plaintiff in June 1984, despite long and constant claims by the plaintiff that it did. On cross examination, the plaintiff himself was forced to admit that he "didn't have any proof as to who might have done it" (T. Jan.13 pp. 104-105) and that he had no idea of the name of the person he allegedly gave this post dated check to or even at which branch office of the bank this event occurred. (T. Jan 13. pp. 101).

The check which was allegedly altered was returned twice for insufficient funds in the plaintiff's account. (T. Jan. 13 pp. 63 and pp. 105-107).

The plaintiff himself found that the terms of the mortgage note "spoke for itself very clearly" and that there "was no doubt in his mind what it meant" and that the note was "very clear and unambiguous". (T. Jan. 13 pp. 128-129).

No expert testimony was presented as to the meaning of the terms of the note which provides that the plaintiffs promise to pay the defendant Bank "the sum of $40,900 with interest from date at the rate of 7-1/4% payable monthly, in advance, upon the unpaid balance of the note".

The mortgage note in question provides for monthly payments of $323.26, a figure which the plaintiff freely admits that he was aware of at the time of the mortgage closing on November 27, 1972, and that he had no objection to (T. Jan. 13, pp. 130-132). The plaintiff further testified that it was not

significant to him if the payment had been a few dollars more, or a few dollars less, as long as it was the correct number. (T. Jan. 13, pp. 132). At no place in the record does the plaintiff offer any evidence as to the basis of what he claims the correct monthly mortgage payment should have been. Nor is there any finding in the record of Mr. Ivimey's qualification as an expert to offer an opinion as to what the amount of the mortgage payment should have been.

The defendant calculated the monthly mortgage payments by using a publication of the Financial Publishing Company (Plaintiff's exhibit II") (T. Jan. 14, pp. 8-9). A former employee of the Financial Publishing Company testified that there was

no indication in this publication limiting its use by a Bank to any particular type of mortgage note, whether calling for the application of principal and interest payments in advance or in arrears and that it was reasonable for the defendant Bank to rely on the figures in this publication in connection with the preparation of mortgage documents. (T. Jan. 15, pp. 44-47, 61-63).

The defendant instituted foreclosure proceedings in October, 1985 against the plaintiff when his mortgage account was only paid through October, 1984. (T. Jan. 14, pp. 69. testimony of Donohoe).

The plaintiff, John Ivimey, testified that he was not afraid of the foreclosure proceedings (T. Jan. 13, pp. 48). The plaintiff Katherine Ivimey, while present in

court during part of the proceedings, never testified on any subject including any emotional distress that she suffered as a result of the foreclosure proceedings. No medical bills or any evidence of any treatment or damages associated with the claim of emotional distress was presented.

The plaintiff freely admits that prior to the foreclosure he made no payment for the month of August, 1984. He offered no reason for this failure to pay. (T. Jan 13, pp. 111.)

The plaintiff further admits that he had no knowledge of his credit reputation, whether good or bad. (T. Jan. 13, pp. 135). He offered no evidence of any publication of his credit history by the defendant to any person or entity outside the bank itself.

The plaintiff admits that the defendant withheld tax escrow money and paid it

over to the Bethlehem tax collector in a timely fashion on the tax liability of the plaintiff. (T. Jan. 13 pp. 138). No evidence was presented suggesting the defendant took an excessive amount in escrow or that it failed to make tax payments on behalf of the plaintiff.

The plaintiff further testified that he agreed to accept the defendant's practice of requiring each monthly payment to be made on or before the 26th day of each month by considering the mortgage contract amended. (T. Jan. 10, pp. 87-88).

The plaintiff's witness, Louis Clini, was unable to offer any relevant evidence regarding the note in issue in this case. (T. Jan 13, pp. 75-92). The plaintiff's witness, Robert Collett, was not allowed to

testify regarding his legal interpretation of the note because he was not properly qualified to do do. (T. Jan 15, pp. 7-11), and was not allowed to submit documents found in the files of the Financial Publishing Company as business records because no proper foundation for the admission as such was made, nor was the relevancy to the note in this case established. (T. Jan. 15, pp. 16-34).

The plaintiffs did not seek to set side this verdict in the trial court, but instead appealed to the State Appellate Court, which affirmed the trial court. Petitioner's motion for reargument and reconsideration was denied.

Petitioner's petition for certification to the Connecticut Supreme Court was denied, as was their later motion for reconsideration.

It should be noted that at no time in the state court appeal did the petitoners specifically raise or brief the question of whether their Seventh Amendment right to a trial by jury was denied by the directed verdict.

SUMMARY OF ARGUMENT IN OPPOSTION

The Petitioners request this Court to review a Connecticut Appellate and Supreme Court determination that they presented insufficient evidence at a jury trial to withstand the Respondent's motion for a directed verdict. This involves no important federal question.

The petitoners do not claim that the Connecticut statutes, rules of practice or custom regarding directed verdicts are a violation of the Seventh Amendment to the United States Constitution.

There is no important federal question regarding the trial court's decision not to admit into evidence before a jury Petitioners' offer of irrelevant expert

opinion, or testimony of an expert witness who was not properly qualified to offer an opinion on a particular subject.

There is no important federal question regarding the trial court's ruling excluding parol evidence on the meaning of a mortgage note which petitioners admit is unambigious.

The Petitioners are not able to show that a federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

REASONS IN OPPOSITION TO CERTIORAI

This case does not present any substantial or important federal question for review. It is merely an attempt by the Petitioners to gain further review of their claim that there was sufficient evidence to withstand the Respondent's motion for a directed verdict.

The Respondents have not requested Supreme Court review of whether any state statute, rule or custom regarding a directed verdict in a civil jury case is a violation to the right of a trial by jury as contained in the Seventh Amendment to the United States constitution. The Seventh Amendment applies only to federal courts.

Alexander v. Virginia, 413 U.S. 836, 37 L.Ed. 2d 993, 93 S.Ct. 2803 (1973); reh den. 414 U.S. 881, 38 L.Ed. 2d 128, 94 S.Ct. 29. The Seventh Amendment has not been considered an element of the Fourteenth Amendment due process clause applicable to the states. Bringe v. Collins, 274 Md. 338, 335 A 2d 670 (1975); application den. 421 U.S. 983, 44 L.Ed. 2d 475, 95 S.Ct. 1986. Gluck v. Gluck, 181 Conn, 225, 435 A.2d 35 (1980). The Petitioners have not raised in their Appeal or the Trial Court their claim that this directed verdict violated their rights to a trial by jury under the Connecticut constitution.

Motions for a directed verdict have long been constitutionally accepted. Federal Rule of Civil Procedure 50 (a) provides that if during a trial by jury a party has been

fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim. F.R.C.P. 50(a) has been repeatly upheld as constitutional. Galloway v. United States, 319 U.S. 372, 63 S.Ct.1077, 87 L.Ed. 1485 (1943), reh den. 320 U.S. 214, 63 S.Ct. 1443, 87 L.Ed. 1851.

Connecticut allows directed verdicts if on the evidence the jury could not reasonably and legally reached any other conclusion. A jury may not resort to mere conjecture and speculation. If the evidence would not suppport a finding of the particular issue, the trial court has a duty not to submit it to the jury. Munson v. United Technologies Corporation, 28 Conn. App, 184, 191, 609 A.2d 1066 (1992).

In truth, the Petitioner's are attempting to gain review of the trial court's finding of insufficient evidence in this this trial by cloaking their petition in the guise of a Seventh Amendment right. The insufficiency of the evidence to justify a directed verdict for the defendant has been affirmed by both the Connecticut Appellate Court and the Connecticut Supreme Court. The right to a trial by jury still requires the plaintiff to produce sufficient evidence as a matter of law to allow the jury to consider the case.

There also is no federal question involved in the state trial court's evidentiary rulings excluding excluding expert opinion offered by the Petitioners' witnesses. Such state law claims were considered in the Petitioners' appeal in the state system. These rulings were affirmed and there is

nothing to support any federal claim by virtue of the fact that the trial court sustained objections to such offered expert opinion as being either irrelevant to the issues in the trial, or not properly qualified as expert opinion. It is important to note that the Petitioners were at the time of trial represented by counsel, who in accordance with Connecticut evidence law duly took exception to the court's rulings. But the exception by counsel did not suggest that the Seventh Amendment gives the Petitioners the right to disregard Connecticut evidence law and allow the jury to consider anything and everything that Petitioners desired. While this is the claim the Petitioner's now make, the right to a

trial by jury is not a license to ignore Connecticut's law of evidence regarding relevance and qualification of expert witnesses.

Finally, there is no federal question presented in the Petitioner's claim of error by the trial court in refusing to allow parol evidence to the jury to interpret a contract which the Petitioner John Ivimey himself testified was "very clear and unambigious" and that "there was no doubt in (his) mind what it meant." If there is no ambiguity in a contract, there is nothing for a jury or finder of fact to interpret. Without an ambiguity, parole evidence is not admissible. see, Jay Realty, Inc. v Ahearn Development Corporation, 193 Conn 52, 56 (1983). The right to a trial by jury does

not give the Petitioner the right to produce evidence to tell the jury what "very clear and unambigious" words mean.

The Petitioner attempts to manufacture a federal question so as to create a jurisdictional door to the Court under 28 U.S.C. 1257(a). Their Petition, however, totally ignores Rule 14.1 (h) of the Supreme Court which requires the Petitioner to specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal question sought to be reviewed was raised; the method and manner of raising it and the way it was passed on by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific references to the places in

the record where the matter appears as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The Petitioners never mentioned a claim of a right to a trial by jury as set forth in the Seventh Amendment at any time before the trial court or in their Brief to the Connecticut Appellate Court. It is far too late in this eight year old litigation to suddenly discover a federal question with no record to review.

The Petitoners have had their right to a trial by jury fully honored. Quite simply, they just could not prove any of their many claims against the Respondent.

CONCLUSION

For all of the foregoing reasons the Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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